

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 9, 2001 Session

STATE OF TENNESSEE v. FREDERICK LAMAR DIXON

**Direct Appeal from the Circuit Court for Madison County
No. 99-178 John Franklin Murchison, Judge**

No. W2000-00577-CCA-R3-CD - Filed March 19, 2001

The Defendant, after a jury trial for aggravated robbery, was found guilty of the lesser included offense of robbery. Tenn. Code Ann. § 39-13-401. The Defendant challenges his robbery conviction relying upon the recent Supreme Court holding in State v. Owens, 20 S.W.3d 634 (Tenn. 2000). We agree with the Defendant that Owens is controlling and hold that the violence or intimidation by the Defendant occurred subsequent to the theft he committed, such that the facts in Owens are indistinguishable from the facts in the instant case. Therefore, the Defendant's conviction of robbery is reversed; however, we modify the trial court's judgment to show a conviction of theft of merchandise, a Class A misdemeanor. See Tenn. Code. Ann. § 39-14-103 & 105(1). Further, the case is remanded for re-sentencing consistent with the theft of merchandise conviction.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed, Modified
and Remanded for Sentencing Consistent with Modification**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID G. HAYES and JOE G. RILEY, JJ., joined.

C. Michael Robbins, Memphis, Tennessee, and George M. Googe, District Public Defender (on appeal); Scott Kirk, Jackson, Tennessee (at trial), for the appellant, Frederick Lamar Dixon.

Paul G. Summers, Attorney General and Reporter; Lucian D. Geise, Assistant Attorney General; James G. (Jerry) Woodall, District Attorney General; and Shaun Alan Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 1, 1998, the Defendant, Frederick Lamar Dixon, and a juvenile accomplice were arrested at a Home Depot store in Madison County after stealing store property. The arrest ultimately led to a four count indictment for aggravated robbery, criminal impersonation, theft of property, and contributing to the delinquency of a minor. On June 2, 1999, the Defendant entered

into a negotiated plea agreement and pled guilty to all indicted counts except the aggravated robbery indictment. The theft to which the defendant pled guilty involved property that was not the subject of the alleged robbery. On June 3, 1999, the Defendant went to trial on the aggravated robbery charge and was found guilty of the lesser included offense of robbery by a Madison County jury. The Defendant's appeal is based extensively upon the recent Tennessee Supreme Court case of State v. Owens, 20 S.W. 3d 634, 641 (Tenn. 2000), wherein the Court held that "the use of violence or fear must precede or be contemporaneous with the taking of property from the person to constitute the offense of robbery." The Defendant contends that the facts of this case and the facts of Owens are indistinguishable. After a review of the instant case and Owens, we agree with the Defendant.

FACTS

The Defendant testified that he and a juvenile accomplice entered a Home Depot store in Madison County, Tennessee, with the intent to commit theft therein. A store security officer testified that when the Defendant entered the store, the Defendant and his accomplice first went to an area of the store where tools were displayed. While in the tool area the Defendant selected a hole saw kit, placed it in his hand basket, and covered it with a newspaper advertisement that he had in his possession. The Defendant and his accomplice then proceeded to the electrical area of the store. While in the electrical area, the Defendant removed a dimmer switch from the shelf, removed the switch from its packaging, and then concealed the switch. The Defendant then removed the hole saw kit from the hand basket and helped his accomplice conceal it in her pants.

Store security further testified that after the Defendant concealed the first dimmer switch and helped his accomplice conceal the hole saw kit, the Defendant picked up a second dimmer switch and proceeded to the checkout lane. After paying for the second dimmer switch, the two proceeded towards the exit doors to leave the store. The Defendant admitted that he purchased the second dimmer switch to detract from the suspicion he had attracted, and stated that he would have returned the switch at a later time for a refund.

The store security officer and the Defendant both testified that as the Defendant and his accomplice were leaving the store they were stopped - the juvenile accomplice was stopped immediately before she exited the store and the Defendant was stopped five to ten feet outside the store. The store security officer further testified that the Defendant became violent when he was approached outside the store. After a brief exchange of words, the Defendant struck the store security officer in the head and attempted to flee. The store security officer chased the Defendant through the store parking lot. As the Defendant tried to get into his vehicle, the store security officer, with the aid of a bystander, successfully detained the Defendant.

After the Defendant was brought back into the store, police arrived and questioned him. Testimony was given at trial that the Defendant gave officers a false name in an attempt to escape the charges that he faced. The Defendant's true identity was later discovered.

The Defendant was subsequently indicted for aggravated robbery, criminal impersonation, theft of property, and contributing to the delinquency of a minor. On June 2, 1999, the Defendant pled guilty to all indicted offenses except the aggravated robbery indictment. On June 3, 1999, a Madison County jury found the Defendant guilty of the lesser included offense of robbery.

ANALYSIS

A. Standard of Review

In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994). On appeal, the State is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. Bigbee, 885 S.W.2d at 803. This Court will not disturb a verdict of guilt due to insufficiency of the evidence unless the defendant demonstrates that the facts contained in the record and the inferences which may be drawn therefrom are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). Accordingly, it is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994).

B. Robbery & Theft

In Tennessee, robbery is defined as “the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401(a). After the Defendant’s conviction for robbery, the Tennessee Supreme Court released State v. Owens, which stands for the proposition that “the use of violence or fear must precede or be contemporaneous with the taking of property from the person to constitute the offense of robbery.” Owens, 20 S.W.3d at 641.

The facts in Owens are substantially similar to the facts in the instant case. Defendant Owens entered a Dollar General Store, selected an article of clothing, and left the store without paying for the property. The store supervisor, aware of the theft, chased Owens several blocks. At some point during the chase Owens stopped abruptly and brandished a box cutter threatening the store supervisor. The store supervisor ended his pursuit. Owens then walked away from the site of the alleged assault. Owens was later apprehended by a store security officer and taken into custody. Owens was subsequently indicted and convicted on a charge of robbery. Owens, 20 S.W.3d at 636. Owens’ robbery conviction was affirmed by a panel of this Court, but reversed by the Tennessee Supreme Court.

In the instant case, the Defendant entered a Home Depot store, selected a dimmer switch from the store shelves, concealed the property, and then left the store without paying for the property. In a slightly different fashion from Owens, however, the alleged assault occurred five to ten feet outside the store, and the Defendant then attempted to flee. The Defendant was almost immediately subdued while attempting to flee. The Defendant was charged and tried for aggravated robbery, but was found guilty of robbery.

The only significant difference between Owens and the instant case is the distance away from the store where the alleged assaults occurred. Again, we look back to Owens for guidance on whether the distance from the store at which the theft occurred is a deciding factor that would require this Court to affirm the Defendant's conviction. Owens seems unequivocal in its terms, holding that robbery is committed in Tennessee only if the "theft of property from the person of another" is accomplished "by violence or putting the person in fear." Owens, 20 S.W.3d at 637.

Owens specifically directs that Tennessee view its statute under the common law. In Owens, the Tennessee Supreme Court cites several cases from different jurisdictions that adhere to the common law rule that a theft followed by an assault is not sufficient to support a robbery conviction. Owens, 20 S.W.3d at 638 (citing State v. Holley, 604 A.2d 772, 774 (R.I. 1992) (holding that "force used to retain property already unforcibly taken or force used to escape ... is not the force essential to satisfy the element of force as required for robbery"); State v. Aldershof, 220 Kan. 798, 800-01, 556 P.2d 371, 373 (1976) (holding forth that under common law robbery, "the force used in the taking of property must 'precede or be concomitant or contemporaneous with the taking'"); Register v. State, 232 Miss. 128, 132, 97 So. 2d 919, 922 (1957) (holding that "subsequent violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to robbery"). In light of the Supreme Court's analysis, we interpret Owens as not concerning the distance away from the store at which the theft occurred as a distinguishable factor.

Having established the distance from the stores at which the alleged assaults occurred is irrelevant, we focus our analysis on the timing of the alleged assaults and thefts in both cases. The timing of these factors in proximity with each other is the sole relevant area of analysis, as established by Owens, upon which the Defendant's case hinges. In both cases the alleged assaults are claimed to have occurred after the thefts had been completed. The facts in Owens clearly support this contention. However, to make such a determination in the instant case, this Court must analyze the sequence of events as they played out and make a determination regarding the time at which the theft was completed and alleged assault occurred. If a parallel is found to exist between the two cases, in that a completed theft was followed by an alleged assault, the facts of both cases will inextricably link them such that this Court must reverse the Defendant's conviction for robbery.

In Tennessee, a person commits theft of merchandise if, with intent to deprive the merchant of the stated price of merchandise, the person conceals, removes, takes possession of or causes the removal of the merchandise. Tenn. Code Ann. § 39-14-146(a)(1) & (2). The Defendant admitted in his testimony that the purpose of his trip to Home Depot was to steal items from the store. The Defendant further admitted that he took the dimmer switch from its packaging and concealed it in

a carrying case he had with him at the time. Further, testimony was heard that the Defendant did not have permission to take the property from the store without paying for it. The offense of theft in this case was complete when the Defendant placed the dimmer switch in his carrying case, and thereby concealed or took possession of the merchandise in accord with his admitted intent to deprive Home Depot of the property.

Having found that a theft occurred, we next turn the focus of our analysis to the sequence of events in the instant case. Testimony established that the Defendant and his accomplice entered the store; proceeded to the area where the tools were displayed; selected a hole saw kit; proceeded to the electrical area; selected a dimmer switch; then concealed the items. The Defendant and his accomplice then purchased a second dimmer switch and proceeded to leave the store. The juvenile accomplice was stopped immediately inside the exit doors and the Defendant was stopped about five to ten feet outside the exit doors. Moments after the Defendant was stopped by store security, the alleged assault occurred. The sequence of events clearly establishes that the completed theft occurred well before the alleged assault. The alleged assault therefore did not occur prior to the theft, nor did it occur contemporaneously with the theft, as is required in order to sustain a conviction of robbery.

As set forth above, the evidence is sufficient to support a conviction for theft of merchandise under Tennessee Code Annotated section 39-14-146, which was charged as a lesser-included offense. Thus, we reverse the Defendant's conviction for robbery and modify the trial court's judgment to show a conviction of theft of merchandise under \$500. Further, this case is remanded to the trial court for re-sentencing.

CONCLUSION

The Defendant's conviction for robbery is reversed and the trial court's judgment is modified to show a conviction of theft of merchandise under \$500. This case is further remanded to the trial court for re-sentencing in accord with the trial court's modified judgment.

JOHN EVERETT WILLIAMS, JUDGE